

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAUDHRI, .
Plaintiff, . Case No. 11-cv-05504
vs. . Newark, New Jersey
OSRAM SYLVANIA, INC., et al., . November 15, 2012
Defendants. .

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MADELINE COX ARLEO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: SIDNEY S. LIEBESMAN, ESQ.
Liebesman Law, L.L.C.
1201 N Orange St., Ste 801
Wilmington, DE 19801
(610) 721-3313

THOMAS PACIORKOWSKI, ESQ.
Eichen Levinson & Crutchlow
40 Ethel Road
Edison, NJ 08817
(732) 777-0100
Email: Tpaciorkowski@njadvocates.com

BARRY R. EICHEN, ESQ.
Eichen Crutchlow Zaslow & McElroy,
LLP
40 Ethel Road
Edison, NJ 08817
(732) 777-0100
Email: Beichen@njadvocates.com

1 For the Defendants: DAVID C. KISTLER, ESQ.
Blank Rome, LLP
2 301 Carnegie Center
3rd Floor
3 Princeton, NJ 08540
(609) 750-7700
4 Email: Kistler@BlankRome.com

5 EUNNICE H. EUN, ESQ.
Kirkland & Ellis LLP
6 655 Fifteenth Street, N.W
Washington, D.C. 20005-5793
7 (202) 879-5159
8 Email: Eunnice.eun@kirkland.com
9
10

11 Audio Operator:

12 Transcription Service: KING TRANSCRIPTION SERVICES
901 Route 23 South, Center Ste. 3
13 Pompton Plains, NJ 07444
(973) 237-6080
14

15 Proceedings recorded by electronic sound recording; transcript
produced by transcription service.
16
17
18
19
20
21
22
23
24
25

1 (Commencement of proceedings at 3:02 P.M.)

2

3 THE COURT: Chaudhri v. Osram Sylvania. Can I have
4 appearances, please? For the plaintiffs?

5 MR. LIEBESMAN: Sid Liebesman, Your Honor, from
6 Liebesman Law.

7 THE COURT: Okay. So you're supposed to be over
8 there, aren't you?

9 MR. LIEBESMAN: Yeah, but they got to the table --

10 THE COURT: They did. They beat you to it, okay.

11 MR. LIEBESMAN: I didn't want to suggest to them
12 that we switch sides --

13 THE COURT: Throws off my balance in the universe
14 when people are on the wrong side.

15 MR. LIEBESMAN: Well, I'm okay switching,
16 Your Honor, if -- it's up to Your Honor.

17 THE COURT: That's okay. I can -- I think I can
18 handle it today. Okay.

19 MR. EICHEN: As long as you know that the white hat
20 is on this side now.

21 THE COURT: That's right. It's a test for me.
22 Right?

23 MR. EICHEN: Right.

24 THE COURT: Okay. And who else do we have?

25 MR. EICHEN: Barry Eichen, Eichen Crutchlow Zaslow

1 & McElroy.

2 THE COURT: Okay.

3 MR. PACIORKOWSKI: And Thomas Paciorkowski with
4 Eichen Crutchlow Zaslow & McElroy.

5 THE COURT: Okay.

6 MR. KISTLER: David Kistler from Blank Rome.

7 THE COURT: Okay.

8 MS. EUN: Eunice Eun, Kirkland & Ellis for Osram
9 Sylvania.

10 THE COURT: Okay.

11 ATTORNEY FOR SIEMENS: And I'm Eric -- in-house
12 with Siemens, who is Osram's corporate parent.

13 THE COURT: Okay, guys, have a seat.

14 I got your letters and I spent a good part of
15 yesterday going back and looking at the complaint, looking
16 at -- trying to understand precisely what the claim is here,
17 and trying to understand what the -- what the real issue is.
18 And there's been -- there was discussion, I think, about one
19 interrogatory.

20 I think this is an overall breakdown on where do --
21 where do you draw the line between merits and class discovery
22 in a case like this. And I'll begin by talking -- looking at
23 the complaint. I looked at the complaint because I wanted to
24 see what the potential class was; right? And I look at it,
25 and the class is very broad. It's -- I think the class --

1 | so -- so all the consumer -- if I had to summarize this case,
2 | if someone doesn't -- if I could tell my law clerk what this
3 | was about in a nutshell, I would describe it as a Consumer
4 | Fraud Act case, at its core, a fraud case, a
5 | misrepresentation case about the packaging, and I guess on
6 | some video advertisements for -- for these Sylvania
7 | automotive headlamps, that they claim that they're brighter,
8 | bigger, whatever they are, the three -- the three adjectives.
9 | Brighter, further and wider than others. And -- and that
10 | class is "all" -- in paragraph 21 -- "all persons who
11 | purchased SilverStar headlamps. Excluded from the class are
12 | defendant's officers, directors and employees."

13 | So the class is -- just going back for six years,
14 | all persons who bought headlamps. It's a broad class.

15 | So here's -- here's what I think I need to know
16 | from you, and I think we have to start by maybe having a
17 | meet-and-confer with the lawyers today. There is some
18 | overlap, we all know, between merits and class discovery.
19 | Everyone knows that. It's no secret. And I really tried to
20 | think about what does -- what do the plaintiffs need to make
21 | their motion. And I took a look at Rule 23, and it -- a
22 | lot -- certainly -- need some discovery, defendants going to
23 | want about the class, about -- about similarities between
24 | class members, et cetera. But what do you need from
25 | Sylvania, the light bulb maker to prove the four-prong of

1 Rule 23 and then the latter part of Rule 23? How much do you
2 really need to get into the whole merits of the fraud?

3 That's -- and from your -- I think that the
4 Rule 20- -- the 30(b)(6) notice, I looked at the list of the
5 10 folks you want to depose, taken at their face, it looks
6 like you want to take full merits discovery from the
7 plaintiff's end. I don't see any request to sort of limit it
8 to some basic information.

9 That's what I'm struggling with. And we can talk
10 about this for a long time. I also get the sense that
11 there's really not a sense of cooperation between the sides.
12 There was -- first it was five documents produced, and then
13 there was a rolling production, there seems to be more
14 documents produced, there's a claim about -- you know, they
15 want sales information. They're entitled to some sales
16 information. That goes to, certainly, merits of the claims.
17 No one's going to dispute they get Interrogatory Number 1,
18 how much claim, how much sales per year. And then I get --
19 you know, they gave this general answer, and then there's a
20 follow-up answer that breaks it down a little bit more.

21 I don't -- I don't have discussion of any other
22 document requests or interrogatories that no one's responded
23 to.

24 I think you, in the first instance, need to say I
25 want just a -- I need certain discovery now about the fraud.

1 I mean, because there's all -- what I'm not getting a sense
2 of from the plaintiffs is what do you really need for class
3 discovery in terms of the underlying fraud. That's really
4 what's missing, because -- have to give you something. They
5 can't say you're getting nothing about the underlying
6 advertising. They're entitled to some basic information
7 about the advertising and the testing that form the base- --
8 you know, if you look at the paragraph, it's really only --
9 13, 14 and 15 talk about the front of the packaging. I know
10 there was some discussion where there was different packaging
11 and the packaging changed. Well, maybe you give a 30(b)(6)
12 witness on that. But you don't need to take every single
13 person on the merits.

14 So I'm at a loss of how to proceed, except maybe
15 ask you folks -- you can speak if you want to speak. I'll
16 hear first from the plaintiffs. My inclination is to have
17 you two speak a little bit, because you know what you need
18 and what you want. And what I don't have from your letters
19 is a sense of you want -- I get from the plaintiffs we want
20 all of this, and I get from the defendants, we're not giving
21 you any, because technically you don't need any of it to make
22 your motion. I think there's balance somewhere in the middle
23 that has to be struck. And I think the balance needs to be
24 struck by the lawyers, rather than by me.

25 Counsel.

1 MR. LIEBESMAN: If I may, Your Honor, Sid
2 Liebesman. You know, we -- we endeavored to do exactly what
3 Your Honor suggested without even having the suggestion from
4 the Court; that is, the very first thing that the plaintiff
5 did was issue a 30(b)(6) deposition notice for the purpose --
6 and I explained this to defense counsel -- this was to make
7 it more efficient for both sides. The 30(b)(6) deposition
8 was intended to have the defendant produce an individual that
9 can explain who the persons are, what their roles are, so we
10 may know --

11 THE COURT: But let me stop you for a minute.
12 Here's the problem with it. It's broad. For instance, I'm
13 sure there's all different -- you have a class -- and I
14 started out by going back to the complaint. The proposed
15 class is extremely broad. It's anyone who bought a
16 SilverStar light bulb for six years.

17 So you have a 30- --

18 MR. LIEBESMAN: That was based on these
19 representations, though.

20 THE COURT: Right. But here is the 30- -- but this
21 is why you don't in the first instance, to send out a
22 30(b)(6) notice to say, I want someone to talk about
23 advertising, promotion, and marketing of the SilverStar for
24 six years. That is huge. That could be someone testifying
25 for months.

1 Testing of Silver Star headlights as it relates to
2 the claim within -- complaint -- SilverStar packaging,
3 including brightness, down road, side road -- headlights,
4 bulbs, actual -- that is -- that is not limited. That is
5 very broad.

6 MR. LIEBESMAN: That --

7 THE COURT: And if I'm them and I get that, I say,
8 I don't know if that -- if I could give you someone that
9 could speak to that for six years, advertising, promotion,
10 and marketing.

11 MR. LIEBESMAN: Your Honor, that's -- that's not
12 what the deposition -- so a deposition sought individuals who
13 would identify those persons who were engaged in that
14 activity. We were not looking for substantive information to
15 that level, as that position -- the --

16 THE COURT: Okay. Then you've got to help me,
17 then, because I have the attachment. And what I read from is
18 what -- is your notice.

19 MR. LIEBESMAN: So, then -- so at the very top, the
20 qualifier at the very top.

21 THE COURT: The names, job titles and functional
22 roles of those persons.

23 MR. LIEBESMAN: Exactly.

24 THE COURT: Currently employed.

25 MR. LIEBESMAN: That was all we were looking for.

1 THE COURT: Persons currently or formerly employed.

2 Now, I just start with that. I mean, this is where
3 you've got to give them some information, guys, because
4 they're going to take some -- they're going to take some
5 deposition of someone that's going to give you some little
6 bit of background about this advertising. I'm going to allow
7 that.

8 On the other hand, this is -- how many different
9 types of SilverStar headlamps are there? Is there more than
10 one? Are there different variations? Has it -- has the
11 marketing changed over time? You're asking for the jobs
12 roles of all persons currently and formerly employed who have
13 been involved in advertising, promotion, and marketing.
14 That's probably hundreds of people.

15 MR. LIEBESMAN: Well, that's exactly why we take
16 the deposition, because I don't know. It could be three
17 people, and then we know exactly who we need to depose.

18 THE COURT: Well, that -- well, that's where in the
19 first instance -- when you send something out like this, what
20 it prompts is them saying I'm not answering this, and then
21 you come to me.

22 And I guess, I would ask defense counsel, is there
23 someone presently who is charge of marketing, who could give
24 some background about -- some general information about the
25 advertising, the marketing, and the testing behind the

1 advertising and marketing?

2 MS. EUN: Your Honor, yes, we -- we could -- we
3 could designate somebody to testify on those topics.

4 But our issue, as you -- as you just summarized,
5 with this deposition notice was that in the first instance,
6 it asked for a broad range of information, and secondly, we
7 felt like that -- we felt that that information was actually
8 given in our initial disclosures as it requests in
9 Attachment A to the September 27 deposition notice, as well
10 as in our answer to Interrogatory 16. And when we --

11 THE COURT: Now, tell me how it did that.

12 MS. EUN: Because what Attachment A does is
13 requests the names, jobs, titles and functional roles of the
14 persons involved in basically the marketing and the testing
15 of the products. And in our initial disclosures, we
16 disclosed relevant individuals who will have relevant
17 information to the claims and defenses in this case, and in
18 the answer to Interrogatory 16, plaintiff's Interrogatory 16,
19 we answered with the names of 10 individuals who plaintiffs
20 subsequently noticed for deposition of the individuals that
21 are primarily responsible for the advertising and testing of
22 the SilverStar product.

23 THE COURT: Okay. But here's -- here's what you
24 want to do. You don't want him to take 16 depositions;
25 right?

1 MS. EUN: Right.

2 THE COURT: Okay. That's a good idea.

3 What's a good idea is to help him, say, we'll give
4 you the direct -- the present director of marketing. Have a
5 meet-and-confer with him and say, look, there are -- I don't
6 know -- are there -- are there more than one -- is the 9004
7 SilverStar headlamp, is that what we're talking about here?
8 Let me look at the complaint again.

9 MS. EUN: That's the one that plaintiff purchased,
10 yes.

11 THE COURT: Okay. So you say for the 9004, it's --
12 we've been selling this brand -- selling it for three years,
13 and we'll give you someone, because that's what the -- this
14 plaintiff is about is the 9004. So we're going to give
15 you -- we still sell it. Now, although the class is for
16 anyone purchased the SilverStar headlamps, as opposed to the
17 SilverStar 9004, are there different variations of the -- all
18 the different generations of SilverStar lamps? Are there --
19 is there 9004 or 9001 and 9002? Are there all different?

20 MS. EUN: Absolutely, I think --

21 THE COURT: Right.

22 MS. EUN: -- that there are between 15 and 20.

23 THE COURT: Right. So why don't you start -- I'm
24 not telling you how to do your job. Why don't you say, since
25 this point -- the 9004 and our complaint's based on the 9004,

1 | why don't you give us someone who can give us information on
2 | the 9004, who can talk about present advertising and testing
3 | of the type alleged in the complaint which forms the basis of
4 | the claims. And you can get some background information.
5 | And then maybe you can also ask someone to explain the
6 | different variations of the SilverStar headlamps, because
7 | that would go to commonality. I mean you're going to --
8 | you're not certifying the class based on the 9004. You're
9 | certifying it based on all SilverStar headlamps. Do all
10 | SilverStar headlamps have the same kind of advertising? I
11 | don't know. Is that something you want to know?

12 | MR. LIEBESMAN: Well, sure -- well, yes,
13 | Your Honor.

14 | THE COURT: Okay. So that -- so that's what I
15 | think the problem is. They're going to produce a 30(b)(6)
16 | witness at the -- in the first instance, rather than you
17 | having to go through taking 10 different depositions and --
18 | that, I don't really know about that. That's not my job. A
19 | 30(b)(6) has to become educated on these topics.

20 | So why don't you agree -- I'm going to give you
21 | some time to talk -- agree on a person and agree on what
22 | they're going to talk about. It's not reasonable in the
23 | 30 -- in the very first deposition in the class certification
24 | part of the case, to have one person talk about all
25 | advertising for all headlights for all cars for a six-year

1 period. Right?

2 MR. EICHEN: We're fine with that, Judge. We would
3 only ask that you -- at least we can submit an order that it
4 be taken by X date, some outside date so that we can get it
5 done.

6 THE COURT: That's easy. That's easy. That's the
7 easiest thing anyone's asked me to do all day.

8 MR. EICHEN: And also, from what I understand,
9 there have been -- we've been asked to give -- to tell them
10 what specific questions we're going to ask. I don't think
11 that that should be --

12 THE COURT: Well, no one does that. You give
13 topics. Everyone -- we're all lawyers. We all know you give
14 topics.

15 But, for instance, I think it would -- if you're
16 willing to -- in the first instance, to ask them about the
17 advertising and marketing for the 9004 SilverStar headlamp,
18 you can -- can you narrow it to a time frame? Could you tell
19 them whether it's changed over time? Has it come into -- has
20 the advertising been consistent for three years? Let someone
21 talk about that.

22 MS. EUN: Yeah, we have in our interrogatory
23 responses.

24 THE COURT: And then take that person and ask them
25 about the testing.

1 Now, this is not an invitation for the -- to the
2 plaintiffs to go into all the -- you know, expert -- about
3 expert testimony about the legitimacy or the correctness of
4 the testing, but I think they're entitled to some latitude to
5 say, what do you base -- what are you basing this on, because
6 that's the core of the whole case. The core of the whole
7 case is that -- as I read the complaint, it's not even
8 that -- that the advertising was false as much as it's
9 misleading. Right? You have something in the back, there
10 was a disclaimer saying it was -- compared to 80 percent of
11 halogens at 80 percent strength. I mean is that -- that's
12 really the issue is -- were misleading and false. Right?

13 MR. LIEBESMAN: Well, actually we would use from
14 the documents produced by the defendant, I think I'm pretty
15 comfortable we're going to show that it's false. It's more
16 than misleading.

17 THE COURT: Right. So -- but you can ask them for
18 the study. I mean you have some study -- some background.
19 If it's not oner- -- see, here's -- here's why -- other
20 practical matter. If it's not -- if it's something like you
21 make these representations, you did a study, and there are
22 some studies out there and they are not onerous, they're not
23 proprietary. If they are proprietary, we can have -- we
24 could have it for attorneys' eyes only in the first instance,
25 and here are the studies we did before we did this

1 advertising. That's what you can turn over to them, if it
2 can be accomplished in that sort of way. Because even though
3 that's technically merits discovery, maybe more merits than
4 class cert, if it's not onerous and it can be accomplished
5 with a protective order, I would err on the side of giving it
6 to them, because what I don't want to happen in this case, if
7 they move for class certification and you crossmove to
8 dismiss, and you're going to necessarily bring into issue
9 facts which they're going to say, hey, you didn't let us have
10 discovery on that, and now we can't properly oppose the
11 motion to dismiss on the merits, and that -- that's where a
12 lot of tension falls between merits and fact discovery.

13 So I'm going to give them a little bit of latitude.
14 I'm not going to expect full-blown discovery on all
15 advertising for all the SilverStar headlamps, but I'm going
16 to allow them to take some of this preliminary discovery
17 about the marketing and the studies that back up the
18 marketing. And I don't think that seems to me overly large,
19 particularly if we limit in the first instance in the 9004
20 SilverStar headlamp, and then maybe some discovery about
21 whether it applies -- the same studies and representations
22 exist on other kind of headlamps.

23 So what I want you to do is this. I'm going to
24 give you a few minutes to talk. I don't know from the
25 plaintiff's perspective, are there any other -- a lot of your

1 paper seemed to focus on wanting this deposition.

2 MR. LIEBESMAN: Well, Your Honor, yeah, that's
3 true. But I -- really quickly, because I know Your Honor
4 doesn't want to really get into this, but I just sort of like
5 to --

6 THE COURT: No, I'll get into it.

7 (Simultaneous conversation)

8 MR. LIEBESMAN: I'd like you to appreciate where
9 we're coming from. We issued a 30(b)(6) deposition notice
10 and heard nothing from the defendant. Three business days
11 before the deposition was to occur --

12 THE COURT: They wrote you a letter saying we're
13 not doing it.

14 MR. LIEBESMAN: Well, because we asked them what
15 about this deposition that's supposed to take place in three
16 business days? Oh, we're not going to produce anybody.

17 So now, we don't -- we're at a loss of having --
18 you know, knowing what these people really did, they answered
19 that Interrogatory Number 16 listing the 10 people, whatever.
20 So we notice the depositions of those 10 people, having no
21 information from the defendant about what they did --

22 THE COURT: I'm with you. I read your papers.

23 MR. LIEBESMAN: So they don't even say --
24 Your Honor, they don't move for a protective order and me --
25 you know, I don't know where they come out with this under

1 the federal rules, you don't do this. No motion for a
2 protective order. No notice to us and sufficiently in
3 advance that they're not going to produce these witnesses.
4 The defendant -- defense counsel crosses her arms and says,
5 no, we're not going to produce anybody. Don't even let the
6 deposition -- what I would have done, I would have let at
7 least one deposition go forward, and then if you think we're
8 going too far, use her objection, and then we have a record
9 to come to Your Honor, instead like seeking an advisory
10 opinion, which is almost what we're doing here. And that's
11 the problem, Your Honor. Not even saying -- just saying, no,
12 we're not going to produce somebody when there's a
13 legitimate, valid deposition notice under the federal rules.

14 THE COURT: I hear you.

15 MR. LIEBESMAN: That to me is unheard of. It's
16 sanctionable, actually.

17 THE COURT: Well, here's what I think. I think you
18 need -- both sides need to sort of put that behind you and
19 move forward, because it's not getting you anywhere. And I
20 learn real fast who's being obstreperous and who isn't being
21 obstreperous, and I'm not a fan of the obstreperous lawyer.
22 And I really don't like to micromanage litigation, but I
23 will, if it's necessary, and that jury room becomes a
24 deposition room, and I've had cases with every other Friday,
25 we go through everything until we get cases ready for trial.

1 Judge Pisano taught me that -- that little trick 10 years
2 ago, that if cases are just -- things don't happen, you bring
3 them in every two weeks, you resolve whatever's out there,
4 and you move them forward. And I'll do that here.

5 I really hate to do that in the first instance when
6 there's good lawyers, because I think lawyers should be able
7 to have their own way to handle litigation and manage it the
8 way it is.

9 But this is not the best way to handle a discovery
10 dispute.

11 I hear you, but I also see that -- you know,
12 there's more than what's on the written paper, but the
13 written paper looked like it was a little broad, what you've
14 asked for, but I don't see that there was a meaningful
15 attempt to try to resolve this. And I -- I -- I appreciate
16 what you're saying, but I think we need to put that behind us
17 and we move forward and try to get the case teed up for
18 motions.

19 So if you want to say something, but we really
20 don't -- I don't -- I don't feel a need to hear a response
21 from you, unless you want to say something.

22 MS. EUN: It just goes to the deposition. As we
23 previously stated, we're happy to cooperate with plaintiff's
24 lawyers to establish the guidelines for a 30(b)(6) deposition
25 and to prep a -- wit- -- a deposition to produce for

1 testimony.

2 But the one issue that we're going to -- the one
3 hurdle that we're going to have to deal with is the
4 protective order. Before any more discovery happens, we're
5 going to have to agree upon a protective order.

6 THE COURT: Well, it's very easy.

7 MS. EUN: Yeah.

8 THE COURT: It's the easiest thing out there
9 because we have a model in append- -- appended to our local
10 rules, 5.3. You fill in the blanks, you put in your name and
11 their name, and there's two levels of protection, there's
12 attorneys' eyes only, and there's confidential. You mark the
13 documents. If you can't resolve them, you come to me and I
14 resolve it. Very simple. It's not complicated.

15 So you can mark the deposition for confidential,
16 however you see fit, and you can print that off. You have
17 to -- since you're the one that's seeking the confidentiality
18 order, you have to submit an affidavit consistent with Local
19 Rule 5.3, explaining why it needs to be in place, what
20 irreparable harm will result if it's not entered, and if
21 certain documents are disclosed, and you have to
22 electronically file the certification and the order, and then
23 after it's electronically filed, if there's no objections,
24 then I'll sign it.

25 MS. EUN: We'll take a look at that and discuss

1 with plaintiff's counsel.

2 THE COURT: Okay? Yes.

3 MR. LIEBESMAN: Your Honor, that's fine. I mean
4 I'm glad that she brought up the protective order.

5 There's actually one issue that we have that's
6 preventing us from reaching our own protective order, which
7 sort of parrots the model. This is something that defendant
8 added that is not in the model, which we have an objection
9 to. And it may be, like you're talking about in the
10 depositions, you can certainly -- we could resolve this if
11 Your Honor sort of chimes in on this. Because it's not in
12 the model order. The defendant is trying to preclude who we
13 can use as an expert, by putting in the protective order that
14 we cannot hire an expert who has competed with Sylvania for
15 the past three years, not worked for Sylvania, not currently
16 compete, we cannot hire anybody that competed with this
17 international conglomerate for the past three years. We have
18 an objection to that. We get to choose who our experts are.
19 We said we're happy to -- not get someone who currently
20 competes with Sylvania, but we're not going to agree that
21 they can limit who our expert can be, saying that they cannot
22 have competed with them for the past three years. That is --

23 THE COURT: Well, an expert is a neutral. Right?
24 An expert isn't someone who works for the competitor.
25 Someone who's out in the industry, who holds himself out as

1 an expert. Right? They're not -- who's the big competitor
2 of Sylvania? GE. And you can't be someone who works
3 in-house for GE. He's going to be somebody who is an
4 independent person, right, who is going to -- who hasn't
5 worked for anyone arguably for three years.

6 MR. LIEBESMAN: Well, I don't where you come up --
7 I don't where they come up with the three years. I mean,
8 we may -- we may have -- want to go to an expert that has
9 worked in the industry and somehow --

10 THE COURT: Yes.

11 MR. LIEBESMAN: And they -- and if they want to try
12 to discredit the expert because of his or her background,
13 they can do that. But to say in the first instant we can't
14 even go to an expert that may have competed with Sylvania for
15 the past three years, that is the hang-up we have with --

16 THE COURT: Well, that -- that -- that language
17 shouldn't be in a protective order, because that's asking for
18 a ruling in advance about who can see certain information.
19 So that should be stricken from the protective order. Number
20 one. I don't want that language in a protective order.

21 When you come to the point of if something's marked
22 highly confidential, which is attorneys' eyes only, that's
23 fine; right? So if it's attorneys' eyes only, an expert
24 doesn't get to see it anyway. It's for attorneys' eyes only.
25 I don't know if -- I don't know if that -- the highest level

1 of confidentiality has to go to experts.

2 But if it's -- right now, I can't imagine that for
3 the purposes of class certification, that there's going to be
4 any highly confidential information that an expert needs to
5 see.

6 MR. LIEBESMAN: Well, Your Honor, I mean we're
7 talking about a consultant, we reserve the right to have
8 expert -- it's not uncommon to have expert testimony at a
9 class certification hearing to testify to the extent that the
10 representations --

11 THE COURT: Okay.

12 MR. LIEBESMAN: -- made on those covers are false
13 and why they're false.

14 THE COURT: Okay. Well --

15 MR. LIEBESMAN: So --

16 THE COURT: Well, here's the thing. There's going
17 to be -- here's -- there's going to be attorneys' eyes only
18 and confidential, which is for lawyers, experts, parties;
19 right? So I don't think the highest tier -- I think the
20 highest tier's just for lawyers; right? And the second tier
21 is for lawyers and experts. So when you identify your
22 expert, you should -- as soon as you know who your expert is,
23 you should id- -- you should disclose that as soon as
24 possible to them, and if they have any objection to that
25 particular expert looking at confidential documents, you

1 should let them know right away, and you can tee it up and
2 bring it to me.

3 But that's really the way it would get brought to
4 my attention.

5 MR. LIEBESMAN: Yeah, Your Honor, I've never had to
6 disclose a consulting expert before. I'm -- I'm not talking
7 about a testifying expert right now, because I don't --

8 THE COURT: Well, let -- why don't you take a look
9 at the model --

10 MR. LIEBESMAN: I'm happy to -- I'm happy to --

11 THE COURT: Because -- because --

12 (Simultaneous conversation)

13 MR. LIEBESMAN: -- model -- agreement --

14 THE COURT: Because here's what -- there's two
15 levels; right? If it's attorneys' eyes only, it's highly
16 confidential that no one else can see except you, it wouldn't
17 involve the expert.

18 The second tier is pretty broad, so it's for
19 attorneys, it's for clients. If a client can -- if your
20 client can see it, certainly a competitor can see it. Right?

21 So I don't see what the -- I don't -- I think we're
22 trying to resolve a problem that doesn't exist. Do you know
23 any -- do you want to be respond to this issue? I mean ...

24 MS. EUN: Well, I think that the concern is that
25 contrary to what plaintiff's counsel is saying, we're seeking

1 a narrow -- we're seeking kind of a narrow definition of a
2 direct competitor, someone who occupies the same product
3 market as Sylvania. And the reason that we're -- we were
4 looking for -- to exclude someone who has worked in the past
5 three years for direct competitor from seeing highly
6 confidential documents, as was drafted in our protective
7 order, was that it's a small and specialized industry,
8 especially considering the recession, the current recession
9 and the economic events of the past few years, anyone who is
10 not currently employed by a direct competitor is likely to be
11 looking for a job in the same industry. And that's what we
12 are seeking to protect.

13 And we are willing to look at the model -- the
14 protective order that you've advised us to look at under 5.3
15 of the local rules, and we are happy to evaluate whether any
16 proposed experts have worked for a direct competitor in the
17 last three years, so long as -- or -- or that we would object
18 to anyone that they propose that's an expert because they've
19 previously worked for --

20 THE COURT: Why don't you do this? Why don't you
21 tell them who you believe are the direct competitors? If
22 anyone's worked in a particular industry -- and for these
23 companies in the past three years, and then they could -- you
24 know, it may be much ado about nothing.

25 But I'm not going to put the burden on them in the

1 first instance, if they have a non-testifying expert, to say,
2 you know, we have to check their credential -- we -- we may
3 not know who you're think -- you may not be thinking of the
4 same person we are.

5 So you should write -- if it's -- it's not
6 confidential or attorneys' eyes only, anyone can see the
7 information. Right? If it's confidential and you're
8 concerned that there may be someone, I guess, arguably, who
9 is now a consultant, but in your mind two years ago worked
10 for a competitor, you need to say anyone who worked in
11 this -- in this capacity for these companies, and then they
12 can respond in accordingly. If there's an issue about it,
13 you should raise it because you want to be consistent -- if
14 it's confidential information, you want make sure there's no
15 one in your -- your consultant isn't someone who is a
16 competitor. And, for instance, he could be a consultant that
17 still provides consulting advice to competitors, and they may
18 have an issue with it.

19 So I think it's better for confidential and for --
20 if you're going to show confidential information to anyone
21 that has recent ties to them, you should let them know who it
22 is so I could resolve it, rather than -- rather than have it
23 be secret. You can't take confidential information and say,
24 well, he's our -- he's our consulting expert, we don't want
25 to tell you who it is, but we want to show them confidential

1 information, because I think the local rule even requires the
2 person who sees the confidential information to be agree --
3 to agree to be bound by a discovery confidentiality order.

4 MR. LIEBESMAN: Right.

5 THE COURT: So they'll see who it is.

6 MR. LIEBESMAN: Well, the expert will agree to be
7 bound, but there's no burden to produce in advance a
8 non-testifying consulting expert to the adverse party in the
9 litigation.

10 THE COURT: Right. But there's an obligation to --
11 to have him sign this.

12 MR. LIEBESMAN: Absolutely.

13 THE COURT: So that's the point. I mean, she's
14 going to -- before you give any information to anyone in your
15 company, they're going to sign this agreement, agreement to
16 be bound.

17 Once they sign it, you're on notice of who the
18 person is.

19 MS. EUN: They're -- no. I believe that what
20 plaintiff's counsel is saying is that they don't want to
21 disclose to us the identity of any potential experts, and
22 that's precisely the problem that we would have is --

23 THE COURT: No, they're not saying that. They're
24 saying -- they have -- first of all, the testifying expert,
25 they have to disclose it. It's called Rule 26. Okay.

1 That's easy.

2 For non-testifying experts, they're saying we don't
3 have to disclose it, and they're right that in the normal
4 course you don't have to test- -- they don't have to disclose
5 non-testifying experts. That's the rule. That's the Federal
6 Rules of Civil Procedure.

7 But what they do have to disclose is anyone who's
8 going to look at your confidential information, because they
9 have to sign an agreement to be bound by it.

10 MR. EICHEN: Yeah, but we keep that agreement,
11 Your Honor. That confidentiality -- that doesn't go back to
12 them. We keep it. We give it to the expert. What we really
13 don't have to disclose a non-testifying expert.

14 MS. EUN: You do have to give that agreement to us.

15 THE COURT: Well, here's -- here's the rub. What
16 if your non-testifying expert is someone who is a direct
17 competitor of them who gives -- is someone who they would not
18 want to have see -- would be concerned about them seeing the
19 confidential information.

20 MR. EICHEN: Who is a current competitor?

21 THE COURT: Yes.

22 MR. LIEBESMAN: We've already agreed we're not
23 going to use a current --

24 MR. EICHEN: Yeah, we're not going to do a current
25 competitor. We're not going to --

1 THE COURT: Well, someone who left -- you know --

2 MR. LIEBESMAN: Your Honor, there's no affirmative
3 authority for -- for this -- for us to be engaging in --
4 there's no affirmative authority that the defendant can
5 produce -- obviously, they haven't produced any yet.

6 THE COURT: Here's what I'm going to do. It's very
7 simple. I want you to give them a list of -- of persons that
8 you're concerned -- when you -- who you want to describe as
9 direct competitors. Okay? And you tell them whether --
10 whether someone is.

11 If you haven't -- and let's wait and see until we
12 get to the discovery -- let's see how many documents are
13 marked confidential or non-confidential.

14 MR. LIEBESMAN: Everything is marked -- should come
15 as no surprise, Your Honor. They marked everything
16 confidential.

17 MS. EUN: Not everything was marked confidential.

18 MR. LIEBESMAN: Well, the cover letter said
19 everything is being produced --

20 MS. EUN: Pursuant to the agreed-upon terms of the
21 protective order.

22 MR. LIEBESMAN: There is no agreed-upon protective
23 order.

24 THE COURT: So you're going to use 5.3. Okay? And
25 I want -- I am -- to avoid any other discovery dispute,

1 you -- how many non-testifying experts do you have?

2 MR. LIEBESMAN: One, Your Honor.

3 THE COURT: Okay. So she's going to give you the
4 list. And I want you to -- to avoid this problem, I want you
5 to advise the Court, without advising his name, if that
6 person has worked full -- as full-time employee of one of
7 these competitors in the last three years. If they have --
8 then I'll decide how we're going to handle it. If they
9 haven't, then we -- it is much ado about nothing, and then
10 we're going to avoid another discovery dispute.

11 MS. EUN: Just so it's clear that no confidential
12 documents can be shown to that person prior to your
13 determination.

14 THE COURT: Because he has one expert. He's not --
15 one non-testifying person. He is not going to disclose that
16 person's name. He is not going to show any documents.
17 You're going to say, here are the people -- here are the
18 competitors we're concerned about, and he's going to do a
19 check with this -- this unnamed person, and say, have you
20 worked for any of these companies in the past three years.
21 If he hasn't, then we have no issue. If he has, then I'll
22 decide how we proceed from there. Before any documents are
23 shown. Because I'm getting the sense that there's not even
24 an effort to try to resolve this without involving me. And
25 that's really what needs to be done, because you have

1 competitors. On the other hand, look, they want to know if
2 someone left their biggest competitor a week ago and may need
3 to go back after they stop being a consultant in a week.
4 That's legitimate. So the way you do it is say, I'll check
5 with my guys, and I'll make sure that they didn't recently
6 come off working for a competitor. And then we'll take it
7 from there.

8 So you get him that letter by Monday. And you
9 already have your non-testifying expert. And you let him --
10 him or her know within two weeks after that if there's an
11 issue, and copy me on the letter. I've con- -- I've met with
12 my client -- my non-testifying expert. You don't have to
13 identify him. He or she advises me they have not worked in
14 the last three years for any of these. And that's how we'll
15 do it.

16 MR. EICHEN: And I assume they're also going to get
17 us the 30(b)(6)?

18 THE COURT: I'm giving you a break and you're going
19 to meet and confer, and you're going to talk about place,
20 time, and topics for the 30(b)(6) witness, before we leave.
21 I'll come back in a half hour, or you can let Jessica know
22 when you're ready. And I want to know that. I want to know
23 if there is -- you have a recent letter that you sent to me
24 about their interrogatory answers. I'm not going to deal
25 with that today. I'm going to direct you to meet and confer

1 with them today to see if you can resolve that.

2 Yes.

3 MR. LIEBESMAN: I can make this easy too. I'll
4 state on the record, as we told them, the plaintiff has
5 produced all documents and all information that he has.

6 THE COURT: Look, the plaintiff is the guy that
7 says he bought a headlight. That's what he said. I went
8 into the store and I bought a headlight, and it didn't have
9 the -- and it didn't have the -- it didn't work the way I
10 thought it would work.

11 Here's what they say about the plaintiff: On
12 March 11, 2009, plaintiff purchased one package of the
13 Sylvania's 9004 SilverStar lamps from Walmart in Piscataway
14 for his personal use. He paid 37.63 exclusive of taxes.
15 Plaintiff based his purchase on the false representation --
16 representations described above.

17 So what additional information do you want from the
18 plaintiff?

19 MS. EUN: As we detail in our letter, Your Honor --

20 THE COURT: I didn't read your letter, and I'll
21 tell you why I didn't read your letter. Because I got your
22 letter, I think, two or three days ago. They hadn't
23 responded yet. And I really discourage and will never
24 entertain again -- this is your one chance in this case --
25 hearing a discovery dispute without both sides having an

1 opportunity to reply in writing. If I get a letter the day
2 of the hearing when I have a bunch of briefs and I have six
3 other conferences before this conference at 2:30 in the
4 afternoon, I don't have the time to devote to resolving the
5 issue. And I think it's unfair to even raise -- to deal with
6 the issue when they haven't been given enough time to respond
7 amply. Okay? But -- so I'll give you a little bit of
8 latitude to talk about this. But my preference is that you
9 meet and confer with them and try to resolve the issue.

10 I can't imagine how much information you expect to
11 get from the plaintiff, who went out and bought a light bulb
12 at Walmart. That's his story. What is it that -- what --
13 what -- and you're going to take his deposition. Right?

14 MS. EUN: Absolutely.

15 THE COURT: So tell me what other additional facts
16 or information you want in interrogatory that you're not
17 going to get at his deposition.

18 MS. EUN: Well, Your Honor, and I'm sure as you
19 cannot appreciate if you haven't read our letter yet, but we
20 have made numerous attempts to meet and confer over this
21 issue.

22 THE COURT: Tell me -- tell me what -- what
23 information they haven't given you.

24 MS. EUN: The information that they haven't given
25 us primarily relates to the interrogatories. And we -- we

1 had number of --

2 THE COURT: Tell me what information they haven't
3 given you, factually. Don't tell me what interrogatories
4 weren't answered properly. Tell me what information you
5 don't have from this plaintiff.

6 MS. EUN: The information that we don't have is
7 information to support their -- the contentions in their
8 complaint. That is one of our --

9 THE COURT: I'm going to ask it again. Factually,
10 what -- are you asking for legal -- it sounds like you're
11 looking for legal conclusions.

12 MS. EUN: No, Your Honor, we're looking for
13 information that we need in order to oppose our class
14 certification motion.

15 THE COURT: Give me an example of a fact that you
16 don't have.

17 MS. EUN: For example, what information do they
18 have that -- to support their contention that putative class
19 members all relied on the packaging in the same way that the
20 plaintiff did.

21 THE COURT: I don't think they're ever going to be
22 able to answer that. I don't think that this --
23 interrogatories are directed to a plaintiff. Okay. He
24 cannot -- he has to certify them, just like he does in a
25 deposition. This plaintiff cannot certify nor does he have

1 personal knowledge of what other people relied on. He
2 doesn't know. It's a -- it's an impossible question to ask
3 Mr. Chaudhri to answer. He can't. He has no idea.

4 MS. EUN: Well, then, what we simply ask is that
5 they supplement their responses to say that they don't have
6 that information. But -- and we've asked them to do that and
7 they haven't done that.

8 THE COURT: Well, you can't -- you -- the
9 interrogatory's directed to the class representative. He
10 cannot possibly have knowledge of what other people --
11 unknown people relied on. That's a legal argument you're
12 going to be making in your brief. Your opposition to class
13 certification is we don't know -- it's impossible to know
14 how -- whether people bought the light bulb because it was
15 the cheapest, because they just grabbed the first one off the
16 shelf or whether they relied on the packaging. No one knows
17 that. You can make that legal argument. You don't need --
18 you can't ask him to ask about somebody he doesn't have
19 personal knowledge of.

20 MS. EUN: Well, there -- there are some
21 interrogatories that do go to his personal knowledge that are
22 also relevant to our opposition to class --

23 THE COURT: Give me an example.

24 MS. EUN: -- certification --

25 THE COURT: Because I'm not going order him to

1 answer that -- go ahead.

2 MS. EUN: -- for example, the -- the service and
3 maintenance history of his car; the service and maintenance
4 history of his headlight mechanism; the service and
5 maintenance history of the headlamps that were installed in
6 the car. These are all things that we've asked for and that
7 we haven't received a sufficient response, even though during
8 our meet-and-confer we believed we made some progress, and we
9 believed that plaintiff's counsel had stated that they would
10 consider --

11 (Simultaneous conversation)

12 THE COURT: Can I just ask you a question? What
13 does the maintenance --

14 MS. EUN: -- supplementing their responses.

15 THE COURT: -- history of his car have to do with
16 the light bulbs?

17 MS. EUN: Because the performance of a headlamp
18 doesn't just have to do with the specific headlamp. It has
19 to do with the headlamp mechanism. It has to do with
20 anything electrically related to the car, because that's how
21 a headlamp is powered. And so these are all issues that are
22 going to go to commonality, typicality, predominance, all
23 arguments that we're going to make in our opposition to class
24 certification.

25 MR. LIEBESMAN: Well, then, Your Honor, I ask you

1 to certify the class at this very moment because the
2 defendants on record show that they only test 4 percent of
3 the vehicles. Here, defense counsel said it depends on the
4 vehicle. It depends on the mechanism- --

5 THE COURT: Okay. Here's what you do. Give him --
6 he bought it for his car. Disclose the make, the model, the
7 year of the car. Ask him what the maintenance history is, if
8 he remembers. And if he has any documents about the
9 maintenance history, turn them over in narrative form and let
10 them ask questions about how he maintains his car at his
11 deposition.

12 MR. LIEBESMAN: That's all been done, Your Honor.

13 MS. EUN: What -- the way that they've answered
14 those questions is that the vehicle is no longer in the
15 possession, so they don't have any other information.

16 THE COURT: If the vehicle isn't in his possession,
17 it's not in his -- is that true? Is that what you wrote?

18 MR. LIEBESMAN: Yes.

19 THE COURT: Okay. Did he sell the car?

20 MR. LIEBESMAN: To his brother.

21 THE COURT: I think I'm in People's Court right
22 now. I've got to tell you --

23 MR. LIEBESMAN: I'm sorry, Your Honor, I really --

24 (Simultaneous conversation)

25 THE COURT: -- it's ridiculous. And I have to tell

1 | you, this -- you're big firms. This is an embarrassing
2 | record right now. This is a question about what's the
3 | history of the car. If the guy sold the car, he -- I -- have
4 | you ever had -- you've -- the first car you ever owned. No
5 | one is. We all have old cars. I don't remember the
6 | maintenance history. I have no idea. Most people don't,
7 | unless you're a mechanic. If he sold the car, when did he
8 | sell -- tell them -- give them the information. You sold the
9 | car in 2010. To the best of his knowledge, he had it for
10 | four years. To the best of his knowledge, he had regular oil
11 | to -- he bought it used, he bought it new, whatever it is,
12 | tell her. If he has any maintenance records, tell her. If
13 | he doesn't have any, tell her.

14 | That's what you do. And -- you can't get water out
15 | of a stone. It is what it is. I mean --

16 | (Simultaneous conversation)

17 | MS. EUN: We understand that, Your Honor, but
18 | that's precisely the information that we're looking for.

19 | THE COURT: But that's why you're going to meet and
20 | confer right now before we leave the courtroom, and you're
21 | going to agree to give her that information. Did you -- how
22 | long did he own the car for? Do we know?

23 | MR. EICHEN: We don't know how long he owned the
24 | car, but he no longer owned the car over a year and a half
25 | ago. So he --

1 THE COURT: Well -- call him up and supplement it.
2 He owned the car. He bought it new. He bought it used. He
3 owned it for four years. He did not keep regular -- he has
4 maintenance records. Some people are very careful about
5 their records. He turned them over to the new owner. He
6 sold it to X. That's all you have to do, and that'll end the
7 inquiry. It'll be -- it's a 20-minute conversation with your
8 client and give them the information.

9 MR. EICHEN: We already did that, Your Honor. And
10 we disclosed that he has no maintenance records for this
11 vehicle. And we --

12 (Simultaneous conversation)

13 THE COURT: -- okay. He has no maintenance
14 records. So she's told that he has no maintenance records.
15 So find out when he bought it, when he sold it, whether he
16 bought it new or old and who he sold it to.

17 MS. EUN: All right. That's precisely the
18 information that we're looking for that we haven't gotten.

19 THE COURT: But if he tells you -- if they tell you
20 the year and the make and the model, that should be enough
21 for you -- I mean -- this -- this case is not going to turn
22 on -- maintenance of this car. It's sort of extraneous,
23 frankly.

24 MS. EUN: It's not just the maintenance of the car,
25 Your Honor. It's the maintenance of the headlight mechanism

1 and the headlamps. And we -- we understand your position.
2 And we -- but it's just precisely the information that you
3 state that we should be given that we haven't been given.

4 THE COURT: Okay. Well, ask him if he has any --
5 he doesn't have the car anymore and he has no maintenance
6 records. Find out when he bought it, when he sold it,
7 whether he bought it new or old, and then if he recalls
8 whether he did -- he ever replaced the headlights before
9 that.

10 MR. EICHEN: Judge, we'll do all that.

11 THE COURT: That's it. I mean if he says this is
12 the only time he ever replaced it or I replaced them
13 frequently, if I bought it new, I replaced once and I sold
14 it, that's the story, that's the story.

15 MR. EICHEN: Frankly, it really has no relevance to
16 whether or not their representations are true or untrue. But
17 I understand what Your Honor is saying --

18 THE COURT: Give them a little bit of room. It's
19 easier that way because they -- their position is that goes
20 to commonality of the claim. So if his --

21 MR. EICHEN: I understand what their position is.
22 But, Your Honor, we look -- let's just say we'll give you
23 everything you asked.

24 THE COURT: That's fine. That's easy.

25 What other information -- they're going to give you

1 the history of what he recalls about maintenance of the
2 headlight and when he bought the car and whatever maintenance
3 he did with the headlights and to the best of his
4 recollection two years later.

5 Are there -- is there any other factual information
6 you're looking for from the plaintiff?

7 MS. EUN: I think that along -- along the lines of
8 what Your Honor has described, we can go through our letter
9 again with them and try to get --

10 THE COURT: Well, why don't -- I want -- I'm going
11 to take -- I'm going to give you a minute to talk and meet
12 and confer.

13 I'm going to make one other point. I understand
14 that you want that information in advance. But if you're
15 taking a -- Rule 26 empowers me to limit discovery when its
16 benefits outweigh its burden. If you're going to take a
17 deposition anyway, and given how basic his knowledge is, his
18 knowledge is I bought a headlight. That's all. I bought it
19 at Walmart. It wasn't as bright as I thought it would be.
20 That's the whole case.

21 So I'm not going to let -- I'm not going to require
22 them to -- to provide in written form everything you're going
23 to ask him at his deposition. You're entitled to some
24 background so you can take his deposition, but actually, it's
25 not a very complicated deposition to take. So it should be,

1 | like, very -- they'll supplement that one interrogatory. I
2 | can't imagine what other information you need from this guy.

3 | And as to the issue about the contention, I just
4 | want the record to be clear, you can't ask a class plaintiff
5 | to answer a contention interrogatories about the reliance on
6 | representations of other putative class members. That's not
7 | a fact that's within his knowledge. It's -- it's a point
8 | that you can argue in your brief. They can't rebut that.
9 | They can't come back and say every single putative class
10 | member relied on the representation.

11 | So you -- that is not an appropriate thing to ask
12 | him as a class member. I mean -- unless I'm missing
13 | something. How can you ask Mr. Chaudhri what -- what the
14 | reliance is on other class members?

15 | MS. EUN: We were merely asking them to give us the
16 | support for the allegations they made in their complaint.
17 | That's simply what we're asking for.

18 | THE COURT: Well, I'm not sure that there's an
19 | allegation in the complaint that all the class members relied
20 | on --

21 | MS. EUN: There actually is.

22 | THE COURT: Well, why don't you show me where in
23 | the complaint it is.

24 | (Pause in proceedings)

25 | THE COURT: It's in paragraph 52 under the

1 misrepresentation, the common law fraud claim.

2 (Pause in proceedings)

3 MS. EUN: Paragraph 41.

4 (Pause in proceedings)

5 THE COURT: Well, that's not 41. 41 is reliance.
6 Reliance paragraph is in 52.

7 You can certainly ask the plaintiff how he relied
8 on the representations in his deposition. That's a fair
9 question. Okay?

10 And I'm going to give you a few minutes to meet and
11 confer on the 30(b)(6), and then I'll come back and we'll
12 talk about revising the schedule.

13 FEMALE SPEAKER: All rise.

14 (Recess: 3:59 P.M. to 4:27 P.M.)

15 THE COURT: Resolution has been reached.

16 MR. LIEBESMAN: Well, Your Honor, there's --
17 there's been resolution on the matters which you asked
18 substantively, but as a result, there's a procedural issue
19 and a new substantive issue.

20 THE COURT: Okay.

21 MR. LIEBESMAN: I hate to bore you with this.

22 As it relates to the 30(b)(6) deposition, we've
23 agreed on the description of the individual or individuals
24 who will be produced under Rule 30(b)(6). That's done.

25 As it relates to the documents, the information

1 requested by the defendant of the plaintiff with respect to
2 the vehicle, that information will be provided.

3 THE COURT: Okay.

4 MR. LIEBESMAN: The defendant has agreed,
5 consistent with Your Honor's instruction, to provide us with
6 a list of competitors by Monday, and we will follow through
7 with Your Honor's instructions as to whether or not our
8 consulting expert is an individual who works or worked at any
9 of those competitors.

10 I think as a matter of substance, those are the
11 issues that were outstanding.

12 Here's the new problem as it relates to the
13 procedural part of this. The question is timing. We asked
14 when the defendants are going to at least, Your Honor,
15 substantially complete their document production. Not
16 necessarily complete it before we take any depositions, but
17 can they tell us when they're going to be substantially
18 completed, because the last thing we want --

19 THE COURT: Okay. And what -- and what did he tell
20 you?

21 MR. LIEBESMAN: They don't know. And that they
22 withheld -- they intentionally withheld the production they
23 were going to make the other day so that they have something
24 ready, but now they're withholding documents until we resolve
25 the protective order, which they produced 1800 pages without

1 that. Now they're withholding documents --

2 THE COURT: Stop. Let me give you a little bit of
3 a hint. It doesn't help to be antagonistic, and your tone is
4 antagonistic. We'll fix it. It's not the kind of issue
5 can't be fixed.

6 MR. LIEBESMAN: I mean, this is just -- this is
7 just what we've been dealing with.

8 THE COURT: Okay.

9 MR. LIEBESMAN: They want to hold to the
10 December 15th deadline, so these --

11 THE COURT: But let me stop you. And let me ask
12 them. It's not an unreasonable request to say when can you
13 produce the documents. I want -- I can give you an arbitrary
14 date. I could say December 15th. December 10th. I really
15 prefer not to be arbitrary. I like to work with lawyers if I
16 think that they're working with me.

17 So there's been this rolling production. It's not
18 a crazy amount of documents. When do you think you can get
19 them his documents by? It's not an unreasonable position to
20 say I want to see all the documents before I take your dep.

21 MS. EUN: I understand, Your Honor. I -- and I can
22 tell you, as I told him, that I'm not prepared at this time
23 to say how -- actually what plaintiff's counsel asked me is
24 what percentage of documents we've produced to them. And I'm
25 not prepared at this time to give them that answer.

1 But we -- we fully intend on producing all of the
2 documents by the end of the discovery period, by
3 December 15th. And hopefully before that, if we can. We are
4 working very hard to do that.

5 THE COURT: Okay. You have until December 15th to
6 produce every documents going in an order. If you're
7 producing after that, then -- then there'll be sanctions.

8 MS. EUN: Related to class certification.

9 THE COURT: I want everything. I don't want any --
10 all those documents that they've asked that they've
11 requested. Okay. We talked about some latitude with -- with
12 some merits discovery.

13 MS. EUN: Right.

14 THE COURT: And I hope that's what's going to be
15 produced. And after all those documents are produced, then
16 you can take the 30(b)(6) deposition.

17 So, Mr. Liebesman, when do you want to take that
18 deposition?

19 MR. LIEBESMAN: We have three firms. We can review
20 documents --

21 THE COURT: Do you want to take it before
22 Christmas? Holidays? New Year's?

23 MR. LIEBESMAN: I'd like --

24 THE COURT: December holidays or January?

25 MR. LIEBESMAN: I'd rather take it before

1 Christmas, depending on that they don't dump, you know,
2 300,000 pages on us, which I don't think is going to happen,
3 but I'd like at least to have, I think, a day before
4 Christmas. Just before Christmas. If they're producing by
5 the 15th.

6 THE COURT: Going to produce by the 14th, which is
7 a Friday. And then -- I'm going to ask them to produce by
8 December 10th. Okay? And then I'm going to ask you to
9 schedule a deposition sometime the week of -- I'm going to
10 move it back a week till December 10th. I don't think it's
11 fair to expect people to take depositions, unless they choose
12 to, on the week of the 24th or 25th or 26th this year. So if
13 you produce them Monday the 10th, you can produce your
14 30(b)(6) witness on a mutually agreeable date the week of
15 December 17th. Okay?

16 MR. LIEBESMAN: That's fine, Your Honor, that week,
17 we're happy to accommodate that --

18 THE COURT: Okay. Okay.

19 What's the other issue?

20 Does that work for you guys?

21 MS. EUN: Yes, Your Honor.

22 THE COURT: Okay. Good.

23 What's the next issue?

24 MR. LIEBESMAN: During the course of the discussion
25 about the information the defendant wants of plaintiff with

1 respect to make, model, the vehicle, and all the maintenance
2 records, it sort of, you know, came to light the fact that
3 the defendant is going to be using that information to very
4 likely make an argument on individuality. And they -- they
5 said it earlier. So I had said to the defendants, that's
6 fine, we're going to give you that. But, then, what we
7 should be entitled to are that same information for the
8 vehicles that you use to test to derive the information that
9 you put on the package that says nothing about this is
10 limited for any particular vehicle, any year, make, model,
11 anything. That's a problem with a -- I'd say it's a quid pro
12 quo. You want to go down that road, we're happy to do that.

13 THE COURT: And what's their response?

14 MR. LIEBESMAN: They refuse to produce the
15 documents.

16 MS. EUN: That's not true, Your Honor. This is
17 actually the first time that we're hearing this request.
18 It's the first time that -- yeah.

19 THE COURT: Okay. Well, here -- here -- here's
20 where you have to really -- the breakdown is. You said -- I
21 heard for the first time when you explained why you wanted
22 all the maintenance and the -- the history of the car, it's
23 because light bulbs work differently in different cars
24 depending on maintenance, the make, the model, how they're
25 maintained. Okay. I get that.

1 And it's -- I see where you're headed. It's going
2 to commonality; right? So he's entitled -- if you can waive
3 that which you seem -- you sort of suggested that you are,
4 else you wouldn't be asking for the discovery, they're
5 entitled to know on these tests that you did, do they pertain
6 to any particular car? That's a fair question. If they
7 don't, it sort of cuts against your arguments that it's
8 different on different cars. Right?

9 MS. EUN: And to the extent that we have that
10 information, then we can give that to them. It's just we
11 need to evaluate it because we're hearing about it for the
12 first time.

13 THE COURT: Well, this -- I want the 30(b)(6)
14 wit- -- I want the 30(b)(6) witness to include that topic.

15 MS. EUN: Okay, that's fine.

16 THE COURT: Were the tests done on different types
17 of cars and do these recommendations differ with different
18 makes and types of cars. That's what they -- you should be
19 prepared to have your 30(b)(6) witness testify that if what
20 you said earlier to me on the record is true, that you're
21 going to argue that it works dif- -- it's not common because
22 every car and every consumer's car and maintenance record is
23 different.

24 Okay?

25 MS. EUN: That's fine. But just because this is a

1 new request, these aren't documents that we've searched for
2 within the company. And so we'd have to go back and conduct
3 that search, identify the appropriate custodians and so
4 forth, with regard to this new request.

5 THE COURT: Well, I don't know exactly what the
6 request is. But as I understand it from Mr. Liebesman, he
7 just wants to know if the tests that you're going to produce
8 and tell him about, if they are tied to any particular make
9 and model of a car. That's should be in the report that
10 you're going to produce about the brightness, the three --
11 with the three adjectives. If it dif- -- if it differs with
12 cars and maintenance, then you should turn that over. It
13 shouldn't be this -- I don't want this to turn into -- listen
14 to me. I don't want this turn into while this is a whole new
15 request, we hear it for the first time on the record, I can't
16 get it by December 10th, and therefore, when he takes his
17 30(b)(6) representative, I -- he's not going to -- we're
18 unable to produce those documents.

19 This is a pretty basic case; right? So you've said
20 that it differs on different tests or cars. He just wants to
21 know if your research that forms the basis for the marketing
22 on the labels was based on different makes and models of
23 cars.

24 Isn't that what you're asking for, Mr. Liebesman?

25 MR. LIEBESMAN: Yes, Your Honor.

1 THE COURT: That's it. If it wasn't, that's fine
2 too. And your -- and your 30(b)(6) witness should be
3 prepared to talk about that. The deposition's going to be a
4 month from now. You have plenty of time to prepare him or
5 her, because what I don't want to be happen is after the
6 deposition is taken, you have to take another deposition and
7 then at motion practice you're going to argue it's different
8 on different cars and he was precluded from an opportunity to
9 take that discovery on -- on how it varies with different
10 cars.

11 MS. EUN: I understand, Your Honor.

12 THE COURT: Okay? So anything else?

13 MR. LIEBESMAN: Not from us.

14 THE COURT: Okay. What -- does there have to be
15 any adjustments to the deposition -- to the discovery
16 schedule?

17 MR. LIEBESMAN: Well --

18 THE COURT: After you get this -- take this --
19 you're going to take the deposition the week of
20 December 17th; right? So that means you'll take it. You're
21 going to meet and confer. You're going to pick a mutually
22 convenient date for everybody. If you can't agree, you
23 should agree on a reasonable place to take the deposition.
24 If you can, at someone's office in New Jersey. If you can't
25 agree on that, then it comes to my courtroom. So that's

1 December 17th to the 21st.

2 Do you need any other additional discovery? Do you
3 want me to keep discovery open till, say, end of January?
4 Mid-January? Something like that? In case you have
5 follow-ups?

6 MR. LIEBESMAN: Yes, Your Honor, absolutely.

7 THE COURT: Okay. Any -- anything that defendants
8 want to add?

9 MS. EUN: That's fine, Your Honor.

10 THE COURT: Okay. Okay. I will keep -- what dates
11 are you -- do you expect any other -- you're going to --
12 you're going to want to take the plaintiff's deposition;
13 right?

14 MS. EUN: Yes, Your Honor.

15 THE COURT: Okay. And you haven't agreed on the
16 date for that. You'll take that in January or December,
17 whatever you want.

18 MS. EUN: Right. We'll probably notice it for
19 January.

20 THE COURT: Okay. Is February 1 enough time?

21 MR. EICHEN: Judge -- Judge, based on the 30(b)(6)
22 witness, keeping discovery open, can you -- you said
23 mid-January. Can we have till the end of January?

24 THE COURT: Sure.

25 MR. EICHEN: Thank you.

1 THE COURT: What I'm going to do is schedule
2 another -- I'll keep discovery open till February 15th. And
3 we'll have another telephone conference February 13th at
4 3 o'clock.

5 Okay. I'll do the scheduling order. I'll keep it
6 open until February 15, in case there's any issues. If there
7 are any continuing issues, send me letters, please try to
8 meet and confer in advance of the issues. Okay?

9 If there -- what I'd like to do -- I'm going to add
10 this too. Our telephone call will be February 13th at 3 P.M.
11 Two days in advance, by February 11th, I want a joint status
12 letter. Okay? If there's any major issues, we'll turn it
13 into an in-person conference. I'm sensitive to the fact that
14 counsel are traveling. So if there's nothing substantive, we
15 can do it by phone. If there's issues, we'll convert it to
16 an in-person.

17 Thank you.

18 UNIDENTIFIED SPEAKERS: Thank, Your Honor.

19 (Conclusion of proceedings at 4:36 P.M.)
20
21
22
23
24
25

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 54 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

November 21, 2012

Signature of Approved Transcriber

Date

Sara L. Kern, CET**D-338
King Transcription Services
901 Route 23 South, Center Suite 3
Pompton Plains, NJ 07444
(973) 237-6080